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No. 9

In the Supreme Court of the United States

OCTOBER TERM, 1952

WILBUR C. KING, JERRY W. CARTER AND RICHARD A. MACK, AS AND CONSTITUTING THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the district court (R. 132) is reported in 101 F. Supp. 941. The report of the Interstate Commerce Commission (R. 80) is reported in 278 I. C. C. 41.

JURISDICTION

The final judgment of the district court was entered on July 17, 1951 (R. 140). The petition

for appeal was presented and allowed on September 7, 1951 (R. 140, 142). The jurisdiction of this Court is conferred by 28 U. S. C. 1253, 2101 (b), and 2325. Probable jurisdiction was noted January 2, 1952 (R. 824).

QUESTIONS PRESENTED

In two "general revenue" proceedings under Section 15a of the Interstate Commerce Act the Interstate Commerce Commission authorized certain general increases in interstate freight rates in order that the railroads of the country might receive sufficient revenue to enable them to furnish adequate and efficient transportation service. After the State of Florida had refused to permit certain corresponding increases in intrastate freight rates, the Interstate Commerce Commission determined that the lower intrastate rates caused unjust discrimination against interstate commerce and undue prejudice to interstate localities. An order of the Commission raising intrastate rates to the extent found necessary to remove this unjust discrimination and undue prejudice was affirmed by the court below. On appeal from the judgment of affirmance, the questions presented are:

(1) Whether the Commission's order prescribing Florida intrastate rates lacks the support of necessary subsidiary findings because the Commission did not find:

(a) in terms of specific dollar amounts, what revenues from intrastate traffic constitute a fair contribution to the Florida railroads' total revenue needs;

(b) in terms of specific dollar amounts, the total revenue required to enable these railroads to operate efficiently;

(c) that the prior intrastate rates were less than compensatory.[1]

(2) Whether the power given the Interstate Commerce Commission to prescribe intrastate rates under which intrastate traffic will contribute a fair proportion of the revenue needed to enable the affected railroads to furnish adequate and efficient transportation service authorizes the Commission to raise intrastate freight rates if the railroads' revenue needs largely result from deficits in their passenger operations.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 56–58.

STATEMENT

This case involves the validity of an order issued by the Interstate Commerce Commission

[1] Appellants also contend that the Commission failed to find that maintenance of the intrastate freight rates at the interstate level will be reasonable and is necessary to the operation of an efficient and adequate national transportation system. As we point out, pp. 30–32, *infra*, the Commission so found.

in a proceeding under Section 13 (3) and (4) of the Interstate Commerce Act. The order required the railroads operating in Florida to establish, with certain exceptions, Florida intrastate freight rates reflecting the increases maintained on corresponding interstate traffic to, from and between Florida points under the Commission's authorizations in the proceedings known as *Ex Parte No. 162* and *Ex Parte No. 166*.[2] Appellants attack the Commission's order on the grounds that the Commission failed to make certain findings which appellants assert were necessary to a valid order, and that the Commission exceeded its statutory authority. They do not now make any contention that the findings made by the Commission lack evidentiary support.

THE PROCEEDINS IN *EX PARTE 162* AND *EX PARTE 166*

Ex Parte 162 was an application to the Commission authorized by its report of December 5, in April 1946, for a 25% increase in interstate freight rates (264 I. C. C. 695, 698). The Commission, authorized by its report of December 5, 1946, a 20% increase in basic interstate freight rates, with specified different increases for particular commodities (266 I. C. C. 537, 542, 614). In *Ex Parte 166,* initiated in July 1947, the Commission's final report of July 27, 1948, authorized

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[2] *Increased Railway Rates, Rates, Fares, and Charges, 1946, Ex Parte No. 162*, 264 I. C. C. 695, 266 I. C. C. 537; *Increased Freight Rates, 1947, Ex Parte No. 166*, 269 I. C. C. 33, 270 I. C. C. 81, 270 I. C. C. 93, 270 I. C. C. 403.

a 25% increase in basic interstate freight rates in "southern territory," [3] a 30% increase in official territory, a 25% increase in part of western territory, and a 20% increase in the remainder of that territory, subject to maximum amounts on particular commodities and to flat increases on others (R. 84).

In each of the two proceedings the Commission found that the rate increases which it authorized would provide additional revenue required by the railroads to enable them to carry out essential rehabilitation of plant and equipment and to maintain transportation service adequate to the needs of commerce, the postal service, and national defense; and found that the railroads' critical need for greater revenue following termination of World War II resulted from sharply higher operating expenses (due to increased rates of pay and other wage benefits to railroad employees, additional payroll taxes, and higher prices for materials and supplies, particularly fuel), and a precipitate decline in revenue from passenger traffic.[4]

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[3] Southern territory is roughly the area south of the Ohio and Potomac Rivers and east of the Mississippi River (270 I. C. C. 403, 456).

[4] See 264 I. C. C. 695, 702, 704–706, 737–738; 266 I. C. C. 537, 544–546, 613–614; 269 I. C. C. 33, 42–44, 53–54; 270 I. C. C. 81, 87–90; 270 I. C. C. 93, 95–98; 270 I. C. C. 403, 406, 428–431, 440.

In each proceeding the Commission acted after receipt of testimony and evidence of the most comprehensive character and after a week of oral argument before the entire Commission.[5] The Commission acted in full recognition of the gravity of the issues presented for determination, and it was acutely aware that any substantial increase in freight rates would affect the Nation's entire economy. In *Ex Parte 162* it said (266 I. C. C. 537, 613):

> What we do will directly affect production and distribution in the industries of the Nation, and the welfare of its various regions, as well as the transportation industry. It will have its effect upon the forces tending to economic stabilization or the reverse. * * * No case has ever received from us more earnest study.

In Ex Parte 166 it observed that responsible authorities had strongly urged that an increase in freight rates "might stimulate already existing inflationary forces," but the Commission concluded that this factor was outweighed by the necessity of enabling the railroads, confronted with a sharp ascent in operating costs, to "main-

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[5] 266 I. C. C. 537, 543; 270 I. C. C. 403, 410. In *Ex Parte 162*, 366 witnesses were examined and 216 verified statements were received; in *Ex Parte 166*, 473 witnesses testified, 286 verified statements were received, and on oral argument 102 counsel were heard and 112 written arguments were received (*ibid.*). The hearings for the taking of evidence were conducted by Division 2 (consisting of four Commissioners) or by a Commissioner and an examiner (*ibid.*).

tain their credit, procure additional equipment which is now urgently needed, and rehabilitate and improve their properties generally to take care of the demand of the public for adequate transportation service" (269 I. C. C. 33, 53). See also 270 I. C. C. 93, 97.

Since the two proceedings were grounded upon basic revenue needs, the Commission, as shown by its various reports, considered and acted upon the revenues, expenses and net income of the railroads' total operations, both intrastate and interstate. A foundation of the Commission's decision in *Ex Parte 166* as to what rate increase would provide the additional revenue found to be needed was that intrastate rates would be correspondingly increased. The Commission, in estimating the operating revenues reasonably to be expected under the rates "now in effect or found justified by our orders," based its estimate "upon the assumption that timely similar adjustments will be made upon intrastate traffic" (270 I. C. C. 403, 428). Likewise, the Commission's tabulation of the over-all percentage increases in freight rates (both for the United States and for the different territories) resulting from the prior rulings in *Ex Parte 162* and *166*, "assumes increases to have been approved on intrastate traffic similarly to those upon interstate traffic in the same territory, for the whole time" (270 I. C. C. 403, 421). See also 269 I. C. C. 33, 39; 270 I. C. C. 93, 94; 270 I. C. C. 403, 437, 448.

In view of the relation to intrastate rates of the conclusions which might be reached in the two *Ex Parte* proceedings, the Commission invited the cooperation of the state regulatory commissions and a committee appointed by the National Association of Railroad and Utilities Commissioners sat during the hearings and oral argument of each proceeding.[6] A majority of the committee "agreed in general" with the Commission's conclusions in *Ex Parte 162* and the committee concurred in the conclusions reached by the Commission in *Ex Parte 166* (266 I. C. C. 537, 613; 270 I. C. C. 403, 463).

THE RULINGS OF THE FLORIDA COMMISSION

The railroads operating in Florida applied to the Florida Railroad and Public Utilities Commission (Florida Commission) for an increase in Florida intrastate freight rates corresponding to the interstate increase authorized in *Ex Parte 162* (R. 610). Like application was made based on the increases (interim and final) authorized in *Ex Parte 166* (R. 611–613). The railroads presented in support of these applications the record in *Ex Parte 162* and *166* and comprehensive additional evidence (R. 610, 614).

The Florida Commission in its ruling on the application based on *Ex Parte 162* referred to figures and estimates showing that Nation-wide

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[6] 264 I. C. C. 695, 699; 266 I. C. C. 537, 543–544; 269 I. C. C. 33, 38–39; 270 I. C. C. 81, 86–87.

railroad operating costs had increased by more than $2,150,000,000 per annum compared with 1939, and said that although the figures and estimates covered both interstate and intrastate operations, "they bear a direct relation to corresponding Florida intrastate revenues and expenses" (R. 43). The Florida Commission also recognized that there had been many substantial reductions in both interstate rates and Florida intrastate rates since March 28, 1938, and said: "Many of these reductions were so drastic that if the requested increases are granted the resulting rates will even then approximate only 57.7 per cent of the corresponding rate ten years ago" (R. 45).

The Florida Commission granted a 20% increase in Florida intrastate freight rates (the same percentage increase authorized in *Ex Parte 162*), but denied any increase on transportation to mills or processing plants of sugar cane, waste woods, logs, and wet phosphate rock (R. 41, 48–51, 53).[7] The view of the state body was that these incoming shipments involved transportation of raw materials to plants or mills whose shipments of finished products bear the *Ex Parte 162* increase, and that there would be a "double increase" to the industry if freight rates on incoming shipments were increased (R. 49, 50–51).

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[7] The increase on pulpwood was limited to 9%, upon the ground that in 1938 the rates on this commodity were raised 10% in Florida but not in Alabama or Georgia (R. 49–50).

The Florida Commission's ruling on the railroads' supplemental application based on the rate increase finally authorized in *Ex Parte 166* granted a 20% increase in general intrastate freight rates, as compared with the 25% increase in interstate rates in southern territory authorized in *Ex Parte 166* (R. 67–68, 75).[8] The Florida Commission assumed to determine what were the grounds for the Interstate Commerce Commission's grant of such 25% increase, and to determine that these grounds were not applicable to Florida intrastate traffic. The Florida Commission said that "the reasons which appear to have been persuasive in influencing the Interstate Commerce Commission" in increasing interstate rates 25% in southern territory "are of but minor importance with respect to Florida intrastate traffic" (R. 70). It said that the Interstate Commerce Commission had authorized only a 20% rate increase in interstate rates in most of western

[8] The increase permitted on road aggregates (sand, gravel, etc.) was 10% and on class rates and rates based thereon was 10¼%, and no increase was granted on sugar cane moving to mills, waste woods moving to Pensacola, Florida, and fertilizer and fertilizer materials (R. 67, 71, 84–85).

As to general increases, the following sets forth the action of the Interstate Commerce Commission in *Ex Parte 166* and the corresponding action of the Florida Commission (R. 611–613):

Interstate Commerce Commission		Florida Commission	
Date of Order	Increase	Date of Order	Increase
10/ /47	10% interim	11/10/47	None
12/29/47	20% interim	4/ /48	20% interim
4/13/48	25% interim	Action deferred	
7/27/48	25%	11/13/48	20%

territory "because of more favorable operating conditions," and that there was "equal justification" for granting only a 20% increase in Florida intrastate rates (R. 71).

THE INTERSTATE COMMERCE COMMISSION'S ACTION ON FLORIDA INTRASTATE RATES

On the petition of railroads operating in Florida, the Interstate Commerce Commission instituted in January 1949 a Section 13 investigation of Florida intrastate rates (R. 78–80). At hearings before one of the Commissioners and an examiner (R. 149), numerous witnesses were examined (R. 156–572), various verified statements were received in evidence (R. 610–690, 692–756, 776–820), and over 170 exhibits were introduced.[9] The Commission, after hearing argument on exceptions to the examiner's proposed report (R. 81), rendered its report on May 4, 1950 (R. 80). It concluded that, with certain exceptions and limitations,[10] Florida intrastate rates should be established reflecting the same increases maintained on like interstate traffic under the Com-

[9] By stipulation of the parties, most of the exhibits have not been printed (R. 821–822).

[10] The exceptions and limitations are substantial. The prescribed increase did not apply to rates on road aggregates, petroleum and its products, and certain other commodities; intrastate single-line rates on fertilizer and fertilizer products were not to be increased above those being maintained by the Florida East Coast Railway (R. 85, 105–106, 119–120).

mission's authorizations in *Ex Parte 162* and *Ex Parte 166*, but that no intrastate rate was to be increased above the corresponding interstate rate on traffic to and from Florida points (R. 119–120). The changes so established were estimated to increase rail revenue by about $915,000 annually (R. 86).

The Commission's report, issued more than 15 months after the proceeding was instituted, occupies 40 pages of the printed record (R. 81–121). The Commission reviewed in detail intrastate and interstate class rates and intrastate and interstate commodity rates on commodities which move in "substantial volume" in Florida,[11] and found that intrastate rates were uniformly below the level of the corresponding interstate rates (R. 86–102, 113–118). The Commission also considered and made findings with respect to various other aspects of its Section 13 investigation (R. 104–113). Its ultimate findings (R. 118–120), which include a finding that present Florida intrastate rates cause and will continue to cause unjust discrimination against interstate

[11] The commodities considered were agricultural limestone, fertilizer and fertilizer materials, logs, lumber, phosphate rock, pulpwood, resinous wastewood, and sugar cane.

The Commission found that these commodities were "fairly representative of the relative situation, intrastate compared with interstate," of other commodities, (R. 102–103). There was clear evidentiary support for this finding since exhibits showed in detail the intrastate and interstate rates on "practically every commodity of any importance moving in Florida" (R. 103).

commerce (R. 119), are set forth under point I of the Argument (*infra*, pp. 29–30). We presently merely call attention to certain significant subsidiary findings.

The unit cost of handling Florida intrastate traffic is at least as great as the cost of handling interstate traffic within Florida (R. 108). The cost of train operations is higher in Florida on intrastate than on interstate traffic because intrastate traffic moves preponderantly in local trains and interstate traffic predominantly in through trains (R. 107) and the unit cost of handling a given quantity of freight a certain distance is greater in local trains than in through trains (R. 108).

Operating conditions in Florida are less favorable than in adjacent States (R. 107). Comparison of the 1947 Florida freight operations of the three railroads having the greatest Florida mileage [12] with the 1947 operations of all carriers in southern territory shows the following (*ibid.*):

	Florida Operations	*Southern Territory Operations*
Revenue tons per train-mile	703.9	843.1
Revenue tons per car-mile	18.4	19.4
Revenue tons per locomotive mile-road	688.7	787.7
Freight operating ratio [13a]	73.4	72.3

[13a] The freight operating ratio is the ratio of operating costs to revenue. Operating results are, of course, less favorable when this ratio is higher.

[12] Atlantic Coast Line Railroad (Coast Line), Seaboard Air Line Railroad (Seaboard) and Florida East Coast Railway (East Coast). The Florida Commission found that these carriers handle about 90% of total Florida rail traffic (R. 70).

In 1948 the three Florida railroads earned an average return of 2.91% on their property investment (including materials, supplies and cash) less depreciation (R. 109).[13] In 1946 the return on such investment was 1.62% for the Coast Line, 4.91% for the Seaboard, and 4.35% for the East Coast (*ibid.*). In 1947 these railroads, without the general increases authorized by the Commission (and extended to most of intrastate traffic), would have had a deficit of $16,871,215 (*ibid.*).

The Commission gave the Florida Commission opportunity to permit the increases found to be necessary (R. 121), but when such permission proved to be not forthcoming, the Commission entered an order on July 25, 1950, carrying into effect the findings of its report of May 4, 1950 (R. 129). Under the terms of the order the Florida railroads, respondents in the Commission proceeding (R. 80), were required to establish not later than September 28, 1950, Florida intrastate rates conforming to the findings of the Commission's report (R. 130).

THE DISTRICT COURT'S DECISION

The members of the Florida Commission, the present appellants, filed suit on September 15, 1950, asking that the order of July 25, 1950, be

[13] The return on investment earned by East Coast, which operates entirely in Florida, was 2.45% (R. 111).

permanently enjoined (R. 1, 17).[14] The Commission and all Class I railroads operating in Florida intervened as parties defendant (R. 133). Certain shippers and traffic organizations intervened in support of the complaint (*ibid.*) but have not appealed from the district court's judgment of dismissal.

The district court held that the determination by the Interstate Commerce Commission that interstate freight rates should be increased to provide additional revenue required for maintenance of an adequate and efficient transportation system, and its determination that Florida intrastate freight rates should be increased so that Florida intrastate traffic would contribute its fair share of the required additional revenue, were not rendered invalid by reason of the fact that the railroads' revenue needs resulted in major part from deficits incurred in their passenger operations (R. 136–137). The court further held that it was clear from the evidence that Florida intrastate freight rates, if not increased, would cause unjust discrimination against interstate commerce (R. 138), and that the Commission's findings bearing upon such discrimination met the requirements laid down in *North Carolina* v.

[14] The parties filed with the court a stipulation providing that the rates prescribed by the order should go into effect on September 28, 1950, and that the railroads would refund to shippers the increased rates collected in the event that the courts should finally hold the Commission's order unlawful.

United States, 325 U. S. 507 (R. 137). The court noted that a saving clause in the Commission's order permits any interested party to secure modification of any specific intrastate rate if modification is shown to be justified by the facts,[15] and that pursuant to this clause certain of the rates incorporated in the Commission's order "have already been modified or removed from the order" (R. 139).

SUMMARY OF ARGUMENT

I

A. The Interstate Commerce Commission issued its order raising Florida intrastate freight rates to remove an unjust discrimination against interstate commerce caused by state-prescribed intrastate rates. The findings requisite to the validity of this order must be determined with reference to the provisions of the Interstate Commerce Act on which the order was based and their purposes. Section 15a makes it the duty of the Commission to exercise its rate-making power in such manner that the nation's railroads will receive sufficient revenue to enable them to render efficient transportation service, adequate to meet the needs of the commerce of the United States, the postal service, and national defense. Section 13 (4)

[15] The Commission's report of May 4, 1950, contains this saving clause (R. 120–121). The order effectuating the findings of the report requires maintenance of rates no lower than those therein approved, "as provided in said report" (R. 130).

implements the directive of Section 15a by clothing the Commission with power to deal with intrastate rates which do not contribute a fair proportion of the railroads' revenue needs and thus unjustly discriminate against interstate commerce. The section is in "dovetail relation" to the purposes of Section 15a. It grants a limited power to prescribe intrastate rates in recognition of the essential unity of interstate and intrastate rail transportation, which in actual operation are inextricably blended.

B. Appellants' attack upon the sufficiency of the findings rests upon the absence of findings (a) as to the dollar amount of revenue from Florida intrastate traffic which would constitute a fair proportion of the affected railroads' total revenue needs, (b) as to dollar amount of total revenue required to enable these railroads to operate efficiently, and (c) that the state-prescribed rates were less than compensatory.

C. In eight unanimous decisions this Court has upheld orders of the Interstate Commerce Commission of the character of the present order notwithstanding absence of the foregoing allegedly essential findings. In addition, a requirement of findings, in specific dollar figures, of total railroad revenue needs and of the contribution from intrastate traffic constituting a fair proportion thereof would cripple the Commission's power to remove unjust discrimination against inter-

state commerce from a revenue standpoint. This Court has consistently rejected interpretations of Sections 13 (4) and 15a which would paralyze effective administrative action by imposing upon the Commission well-nigh impossible tasks, not truly related to the broad purposes of these provisions of the Act. Likewise, the power to raise intrastate rates, given by Section 13. (4), is not limited to rates which are less than compensatory. Such a limitation would cast upon interstate commerce the entire burden of any general upward rate adjustment required by the mandate of Section 15a. It would render the Commission impotent to bring about a fair apportionment of this burden by raising intrastate rates within the zone of reasonableness. Such a construction would defeat the purpose of Section 13 (4).

D. Appellants' attack upon the sufficiency of the findings is grounded almost exclusively upon *North Carolina* v. *United States*, 325 U. S. 507. The order raising intrastate passenger fares in North Carolina was there held to lack the support of requisite findings in that (1) the Commission had not found that the corresponding interstate rate, prescribed by the Commission as the intrastate rate, was "reasonable and lawful" and (2) had made no findings with respect to evidence indicating that the prescribed minimum intrastate rate was, as to the railroads involved, above a

reasonable level. Here there are no missing findings of this kind. The Court in the *North Carolina* case did not expressly hold, and we find no indication that it intended to intimate, that findings of the kind which the present appellants assert to be essential are necessary to the validity of any order of the type before the Court in the *North Carolina* case. Rather it would appear that the Court was of the opinion that, at least in the absence of such findings, the other deficiencies in the findings which were there found to exist were fatal to the validity of the Commission's order.

II

Appellants urge that the increase made in Florida intrastate freight rates was beyond the Commission's authority since deficits incurred in railroad passenger operations were a factor in such increase. The revenue required for furnishing adequate and efficient railway transportation service is necessarily measured by the cost of providing both freight and passenger service. Railroad passenger operations have, as a whole, been conducted at a loss in every year since 1929, except for the years 1942–1945. This situation could be remedied little, if at all, by raising passenger fares because higher fares were likely to accelerate the deep inroads upon rail passenger

traffic resulting from increasing travel by private car, motor bus, and air. The Commission could thus validly conclude that, when fixing rates which would provide revenue sufficient for the railroads' needs, rates for non-passenger transportation services might be fixed in the light of over-all revenue needs, including the need arising from deficits in passenger operations. In fact, the Commission has for a long period of time taken account of such deficits when fixing freight rates in Section 15a revenue proceedings.

This Court has never even intimated that this long continued policy of the Commission is not a proper exercise of the discretion vested in it, both in proceedings under Section 15a, and in proceedings under Section 13 (4) to determine the fair proportion of the carriers' total revenue requirements to be contributed by intrastate traffic. On the contrary, the Court has upheld an order under Section 13 (4) prescribing an increase in intrastate freight rates, corresponding with an increase in interstate freight rates, designed primarily to offset passenger deficits. *United States* v. *Louisiana,* 290 U. S. 70.

Constitutional limitations have been held to forbid a state to fix a nonremunerative rate for particular traffic notwithstanding the possibility that charges for other transportation might offset losses resulting from the nonremunerative rate. This holding suggests no barrier to the power of the Commission to raise freight rates in order

to provide needed revenues which it concluded could not be obtained by other means. The rates so fixed were within the zone of reasonableness and it was for the Commission to determine, under the statute, the rate changes to be made in the light of the railroads' over-all revenue needs. And the Commission, in the proceeding involving Florida intrastate freight rates, plainly was entitled to conclude that, in order to avoid discrimination against interstate freight shippers, a fair proportion of the burden of the interstate freight increase should be borne by intrastate freight shippers.

ARGUMENT

I

THE INTERSTATE COMMERCE COMMISSION MADE ALL FINDINGS ESSENTIAL TO THE VALIDITY OF ITS ORDER PRESCRIBING INCREASES IN FLORIDA INTRASTATE FREIGHT RATES

The findings requisite to support a valid order issued in the exercise of powers conferred by the Interstate Commerce Act obviously vary with the statutory provisions on which the order is based and with the nature of the problem to which the order relates.[16] Where the adequacy of the Com-

[16] While the Commission must make the "basic" or "quasi-jurisdictional" findings essential to the statutory validity of an order, "the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented." *Alabama Great Southern R. R.* v. *United States*, 340 U. S. 216, 228.

mission's findings is brought into question, it is important to consider the meaning and purpose of the applicable statutory provisions, as interpreted and applied where the Commission has exercised authority under like circumstances. We therefore initially discuss the sections of the Interstate Commerce Act which underlie the order attacked in this proceeding and decisions of this Court construing these sections.

A. THE APPLICABLE STATUTORY PROVISIONS AND THEIR PURPOSES

The Commission issued its order under Section 13 (4) of the Act, which provides (*infra,* pp. 57–58) that whenever the Commission finds, after full hearing, that any intrastate rate causes "undue, unreasonable, or unjust discrimination" against interstate commerce, it shall prescribe such maximum or minimum rate as will, in its judgment, remove this discrimination. The Commission found that Florida intrastate freight rates were causing such discrimination because they had not been increased by the same percentage as the increase made in Florida interstate rates pursuant to determinations made by the Commission in proceedings under Section 15a of the Act. This section (*infra,* p. 58) makes it the duty of the Commission, when exercising the rate-making powers conferred upon it with respect to interstate commerce, to give due consideration "to the need of revenues sufficient to enable the carriers" to provide "adequate and efficient railway trans-

portation service." The Commission's Section 15a proceedings were also in effectuation of the national transportation policy declared by Congress—that all provisions of the Act be administered to the end of developing and preserving a national transportation system "adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense" (*infra*, p. 56).

Both Section 13 (4), which authorizes the Commission to deal directly with intrastate rates when they cause undue discrimination against interstate commerce, and Section 15a, which imposes upon the Commission the affirmative duty to fix rates which will enable the railroads to maintain adequate railway service for the people of the United States, were among the new statutory provisions introduced into the Act by the Transportation Act, 1920. They constituted a novel and important departure from prior policy, Congress having been previously concerned mainly with "the prevention of abuses." *New England Division Case*, 261 U. S. 184, 189; *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 584–585.[17] Their enactment

[17] The provision of Section 13 (4) authorizing the Commission to remove preferences or prejudices between persons or localities was, in effect, an enactment in statutory form of the doctrine of the "Shreveport" case, *Houston, E. & W. Texas Ry. Co.* v. *United States*, 234 U. S. 342. But the further provision authorizing removal generally of discrimination against interstate commerce was new, and paralleled

was prompted by the fact that there had been a rapid rise in the prices of materials and labor during 1918 and 1919, so that the railroads, upon termination of wartime federal control and operation on March 1, 1920, "were likely to face a demoralizing lack of credit and income." 257 U. S. at 583–584.

In the *Wisconsin Railroad Commission* case this Court first passed upon the new statutory provisions. It upheld an order of the Interstate Commerce Commission fixing minimum intrastate passenger fares in Wisconsin at 3.6 cents per mile, the increased fare which the Commission had earlier approved for interstate passengers in a Section 15a revenue proceeding.[18] The ground of decision was that intrastate fares below those applying in interstate commerce (under authorization of the Commission in a Section 15a proceeding) could properly be found by the Commission to cause a discrimination against interstate commerce which Section 13 (4) empowered the Commission to remove. The Court said (257 U. S. at 585–586):

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the "general revenue" provisions of Section 15a, as the Court pointed out in the *Wisconsin Railroad Commission* case, at pp. 584 and 586.

[18] In a second case, decided the same day and presenting the same issues, the Court upheld an order under Section 13 (4) fixing 3.6 cents per mile as the minimum fare for intrastate passengers in New York. *New York v. United States*, 257 U. S. 591.

> Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. * * * The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.

The Court observed that if intrastate commerce does not make its equitable contribution to the revenue requirements of the railroads, interstate commerce may have to bear the burden of making up the deficiency through high interstate rates. 257 U. S. at 586. The Court pointedly declared (*ibid.*)—

> it is impossible to escape the *dovetail relation* between that provision [§ 13 (4)] and the purpose of § 15a. *If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity* by directly removing it, because it is plainly an "undue, unreasonable, or unjust discrimination against interstate or foreign commerce", within the ordinary meaning of those words. [Italics supplied.]

The Court held that effectuation of the statutory command that interstate rates should be so adjusted as to enable the railroads to maintain a transportation system adequate to the country's needs requires "incidental regulation of intrastate commerce," and exercise of the authority given by Section 13 (4) therefore does not conflict with

statutory or constitutional limitations on the Commission's powers. 257 U. S. at 588. This was because, from the standpoint of the railroads' over-all revenue needs, the railroad transportation system is essentially a unit in view of the "blending" of interstate and intrastate traffic "in actual operation." "The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines * * *." *Ibid.*

The Court, in sustaining the action of the Commission directed against rate disparity resulting in real discrimination against interstate commerce, said that the Commission "must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level" prescribed by the Commission, 257 U. S. at 590–591. The Court concluded that the saving clause of the order which had been entered permitted such adjustments, by providing that there may be application to the Commission for "appropriate exception" from the rates fixed by the order.[19] 257 U. S. at 591.

This Court has adhered, without deviation, to the interpretation placed upon Sections 13 (4) and 15a in its unanimous decision in the *Wisconsin Railroad Commission* case. We cite below in

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[19] The saving clause to which the Court referred is substantially identical with the saving clause incorporated in the order entered in the present case. See *Wisconsin Passenger Fares*, 59 I. C. C. 391, 396, and R. 120–121.

the footnote the cases passing upon orders issued under Section 13 (4) and presenting the issue of unjust discrimination against interstate commerce caused by intrastate rates below the level of corresponding interstate rates.[20] All except *Florida* v. *United States*, 282 U. S. 194, and *North Carolina* v. *United States*, 325 U. S. 507, which will be discussed later (*infra*, pp. 38–39, 41–44), upheld the orders issued under Section 13 (4); in all except the *North Carolina* case the Court's decision was unanimous.[21]

The Court has further held that this effect of the statute was not altered by the modification of Section 15a made in 1933. Section 15a as originally enacted (41 Stat. 488) not only provided that the Commission, when exercising its rate-making powers, should give due consideration to the country's transportation needs and to the necessity of enlarging transportation facilities in

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[20] *Florida* v. *United States*, 282 U. S. 194; *Georgia Pub. Serv. Comm.* v. *United States*, 283 U. S. 765; *Alabama* v. *United States*, 283 U. S. 776; *Louisiana Pub. Serv. Comm.* v. *T. & N. O. R. R.*, 284 U. S. 125; *United States* v. *Louisiana*, 290 U. S. 70; *Florida* v. *United States*, 292 U. S. 1; *Illinois Commerce Comm.* v. *United States*, 292 U. S. 474; *North Carolina* v. *United States*, 325 U. S. 507; *Alabama* v. *United States*, 325 U. S. 535. See also, *New York* v. *United States*, 342 U. S. 882; *Illinois* v. *United States*, 342 U. S. 930.

[21] We treat *Alabama* v. *United States*, 325 U. S. 535, as comprehended by the *North Carolina* case since the same issues were presented in both cases and the *Alabama* opinion simply refers to the views and conclusions stated in the *North Carolina* case.

order to provide the people of the United States with adequate transportation, but also provided for establishing rates under which the railroads as a whole (or in groups designated by the Commission) would, as nearly as may be, earn from their railway operations a fair return on the value of their property devoted to transportation service; and the net return of any particular railroad was limited, with earnings above this limitation going into a common pool for distribution to weak railroads.[22] The Emergency Railroad Transportation Act, 1933, amended the section so that it read substantially as it now stands.[23]

In *Florida* v. *United States,* 292 U. S. 1, this Court held that the change made in Section 15a did not in any respect modify the authority given the Commission by Section 13 (4) to remove an unjust discrimination against interstate commerce "caused by a disparity of intrastate rates viewed from a revenue standpoint"; that the changes made by Congress do not suggest "an intention to impair the Commission's authority over intrastate rates for the appropriate protection of interstate commerce"; that, on the contrary, the substituted rule of rate making "emphasizes the carriers' need of adequate revenues" and left

[22] As to the text of the section, in part, see 257 U. S., note at pp. 582–583. For a summary statement of the so-called recapture provisions, see 325 U. S., note at p. 515.

[23] As to the text of the section as then amended, see 292 U. S., note at pp. 6–7.

"intact" the power given the Commission by Section 13 (4) "to meet that need where inadequate intrastate rates caused unjust discrimination against interstate commerce." 292 U. S. at 6–8.

B. THE COMMISSION'S FINDINGS AND THE OMISSIONS ASSERTED BY APPELLANTS TO BE FATAL

We submit that, under the statutory provisions which we have outlined, the findings in the instant case meet all the requirements for a valid order. The ultimate findings, which are supported by many subsidiary findings,[24] include the following (R. 118–119):

(1) Transportation conditions incident to Florida intrastate transportation of freight are not more favorable than those within southern territory and between Florida and interstate points (fdg. 2).

(2) Florida intrastate rates below the level prescribed by the Commission are "abnormally low," do not contribute their "fair share" to the revenues required to enable Florida railroads to render "adequate and efficient service," and to achieve the statutory purpose of developing a national transportation system adequate to meet the needs of the commerce of the United States, the postal service, and national defense, and cast upon interstate commerce an undue burden (fdg. 5).

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[24] Some of the subsidiary findings have already been set forth (*supra*, pp. 13–14).

(3) The prescribed intrastate rate increase will "substantially increase" revenue of the railroads operating in Florida and will contribute "not more than a fair proportion" of their total income (fdg. 6).

(4) Present interstate freight rates within Florida and between Florida points and out-of-state points are "just and reasonable," and the intrastate rates fixed by the Commission will not exceed "a just and reasonable level" (fdg. 3).

(5) Maintenance of Florida intrastate rates lower than those fixed by the Commission "causes, and in the future will cause * * * unjust discrimination against interstate commerce" (fdg. 7).

Appellants contend (Br. 2, 26–32), notwithstanding these comprehensive findings, that the following further findings are essential and are missing: (a) "what contribution" from intrastate traffic constitutes a fair proportion of the railroads' total income; (b) "what amount of revenue" is required to enable them to operate efficiently; (c) that the state-prescribed intrastate rates are less than compensatory or insufficient to cover the full cost of service; and (d) that the intrastate freight rates prescribed by the Commission are "reasonable" and "necessary to the operation of" an adequate and efficient national transportation system.

In part, we believe, the assertedly missing findings have been made. Thus the findings which

the Commission has made clearly cover that part of the allegedly essential findings set forth in (d). The Commission found that the intrastate rates which it was prescribing will be "reasonable" (fdg. 3). It also found that these rates are "necessary to the operation of" an adequate and efficient national transportation system. The findings are that the prescribed intrastate rates constitute no more than a fair contribution from intrastate traffic to the revenues required by the railroads to develop and preserve such a transportation system (fdgs. 5, 6).

Similarly, part of what appellants contend for under (a) and (b) has been found. The Commission has found, as to (a), that under the prescribed rates intrastate traffic would contribute no more than a fair proportion of the railroads' total income (fdg. 6). As to (b), it found that the rate increases authorized in the *Ex Parte 162* and *Ex Parte 166* proceedings were required to enable the railroads to operate efficiently.[25] Ap-

[25] The Commission explicitly so found in *Ex Parte 162* (266 I. C. C. 537, 614).

Its final report in *Ex Parte 166* states that the prior reports in that proceeding are to be considered "integral parts" of the final report (270 I. C. C. 403). The report of April 13, 1948, which granted an interim increase, said that the increase is "required to meet the purposes of the national transportation policy and to conform to the standards of section 15a (2) of the Interstate Commerce Act." 270 I. C. C. 93, 97. See also, 269 I. C. C. 33, 54, 270 I. C. C. 81, 90; 270 I. C. C. 403, 406. This interim increase was substantially the same as that authorized by the final report (270 I. C. C. 93, 98; 270 I. C. C. 403, 456).

pellants' contention in this respect thus comes down to a criticism of the Commission's failure to find, as specific dollar figures, the "contribution" from intrastate traffic which will represent a fair proportion of the railroads' total income, to which (a) refers, and the "amount" of the railroads' revenue requirements, to which (b) refers.

Thus the only issues presented by appellants' attack on the findings are whether the Commission's findings as to the "contribution" to be required of intrastate traffic, and the "amount" of the railroads' revenue needs had to be expressed in specific dollar amounts and whether it was necessary for the Commission to find that the existing intrastate rates were less than compensatory.

C. APPELLANTS' CONTENTION THAT THE FINDINGS ARE INSUFFICIENT MUST BE REJECTED AS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OBJECTIVES OF THE STATUTES

Appellants' attack on the adequacy of the findings is rested almost exclusively on the assumed effect of the decision in *North Carolina* v. *United States,* 325 U. S. 507. In the immediately succeeding subsection of this brief we shall point out that that decision does not have the effect which appellants would ascribe to it. Before doing so, however, we wish to point out that orders of the Commission correcting intrastate rates which cause unjust discrimination against interstate commerce from a revenue stand-

point have been repeatedly upheld by this Court, absent the findings which appellants set forth as being essential. We cite in the footnote (together with citation of the applicable Commission reports) eight unanimous decisions of this Court so holding.[26] In addition, an interpretation of the Act under which such findings would be necessary would cripple the Commission's power to remove such discrimination and would run directly counter to the interpretation which this Court has placed upon the Act when similar questions have come before it. We shall develop this proposition

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[26] *Wisc. R. R. Comm.* v. *C. B. & Q. R. R.*, 257 U. S. 563 (59 I. C. C. 391, 396–7);

New York v. *United States*, 257 U. S. 591 (59 I. C. C. 290, 298–9);

Ga. P. S. Comm. v. *United States*, 283 U. S. 765 (160 I. C. C. 309, 325–7);

Alabama v. *United States*, 283 U. S. 776 (113 I. C. C. 389, 430–5);

La. P. S. Comm. v. *T. & N. O. R. R.*, 284 U. S. 125 (155 I. C. C. 247, 279–83);

United States v. *Louisiana*, 290 U. S. 70 (186 I. C. C. 615, 627, 642–3);

Florida v. *United States*, 292 U. S. 1 (186 I. C. C. 157, 187–90);

Illinois Commerce Comm. v. *United States*, 292 U. S. 474 (195 I. C. C. 89, 116–8).

The only cases upsetting such orders of the Commission are *Florida* v. *United States*, 282 U. S. 194, discussed, *infra*, pp. 38–39, and *North Carolina* v. *United States*, 325 U. S. 507, discussed, *infra*, pp. 41–44.

In one case, *Florida* v. *United States*, 292 U. S. 1, the Commission had found that the existing intrastate rate was not "reasonably compensatory" and did not cover the full cost of the service. See *infra*, p. 38.

in connection with the particular issues raised by appellants' attack.

1. *The Commission was not required to cast its findings in specific dollar figures.*—Appellants' proposed finding (b) presupposes that an order of the Commission in a proceeding under Section 15a requires for its support determination by the Commission of the dollar amount of the additional revenue which the railroads as a whole, or those within a given area, require under the tests and standards of that section. It seems clear that any such limitation upon the Commission's authority would frustrate action by it within any reasonable period of time.

Section 15a is primarily designed to meet the critical problem arising when sharp increases in operating costs, or losses in traffic, or both combined, demand prompt relief if the railroads' resources and credit are to be such that they can maintain adequate transportation service and provide themselves with the new equipment, or make other capital expenditures, promoting efficiency and economy of service. In an unregulated industry, individual managements determine the pricing changes appropriate to changes in economic or competitive conditions. In a regulated field such as rail transportation, and one which is national in scope, machinery must be provided by which over-all rates may be regulated upward or downward as required by changes materially affecting railroad economics. Section 15a provides

that machinery. Certainly the Commission should act thereunder only after painstaking inquiry, and in the *Ex Parte 162* and *166* proceedings involved here it did so act (*supra*, pp. 6–8). But the general nature and vast scope of the inquiry are such that to demand the same precision of findings that would be expected in a proceeding involving particular rates would utterly defeat any hope of even reasonably prompt disposition.

Appellants' proposed finding (a) similarly presupposes that, in a proceeding under Section 13 (4) to remove unjust discrimination against interstate commerce caused by intrastate rates which fall short of making a contribution to railroad revenues comparable to that made by interstate commerce following a rate increase under Section 15a, the Commission may not validly act without determining the dollar amount of the contribution to be made by intrastate traffic. This plainly would be a task so complex and time-consuming that effective action would be paralyzed. See *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483.

This Court has firmly rejected any interpretation of Section 15a which would, in practical effect, render it abortive, and it has rejected any like crippling interpretation of Section 13 (4). Under the former section as originally enacted the Commission was directed to fix rates so that the carriers would receive, as nearly as may be,

a fair return upon the value of their property devoted to transportation service. In *Wisconsin Railroad Commission* v. *C. B. & Q. R. R.*, 257 U. S. 563, this Court rejected the contention that the fair return contemplated by Section 15a was on the property used in interstate commerce, segregated from that used in intrastate commerce. It said (p. 588):

> To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it.

In *United States* v. *Louisiana*, 290 U. S. 70, this Court declined to construe Section 15a as authorizing a rate increase thereunder only if the Commission has determined that the authorized increase is reasonable as to each individual rate subject to the increase. The Court said (pp. 75–76):

> the administrative arm of the Commission [would be] paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule.

The Court also held that the Commission, in directing an increase in intrastate rates under Section 13 (4) in order that intrastate traffic should contribute its fair proportion of the additional railroad revenue found to be required in a Section 15a proceeding, need not determine that each individual intrastate rate, as increased by the Commission's order, was just and reasonable. The Court said (pp. 78–79): "The administrative difficulties which would preclude performance of the duty imposed by § 15a if the Commission were required to find that each individual rate prescribed is just and reasonable, would similarly prevent compliance with that under § 13 (4)."

In *Florida* v. *United States,* 292 U. S. 1, 9, this Court said:

> The requirement of essential findings as to revenues did not demand an impracticable exactness. Losses through inadequate rates could be shown satisfactorily even though proof of the precise extent of such losses was not available. Reasonable determinations were required and these were made.

In *New York* v. *United States,* 331 U. S. 284, 308, a suggested interpretation of a 1940 amendment to Section 3 (1) of the Interstate Commerce Act was rejected upon the ground that the amendment, if so interpreted, "would not have achieved its purpose," and "such futility" was not to be attributed to Congress.

2. *The Commission was not required to find that existing intrastate rates were less than compensatory.*—The validity of the order entered in the instant case is likewise not dependent upon the making of appellants' proposed finding (c), that the state-prescribed intrastate rates are "less than compensatory or insufficient to cover the full cost of service." It is true that in *Florida* v. *United States,* 292 U. S. 1, 9, this Court noted that the Commission had found that the state-prescribed intrastate rate was abnormally low and less than "reasonably" compensatory.[27] But there is nothing to indicate that this Court deemed such finding essential to the validity of the Commission's order. The order was entered after additional hearings and findings following reversal of an earlier Commission order in the same proceeding. *Florida* v. *United States,* 282 U. S. 194. The ground for such reversal was that the Commission's finding of unjust discrimination was invalid in the absence of supporting findings that the increase in intrastate rates ordered by the Commission would increase the revenue derived by the railroad from the traffic in question.[28] 282 U. S. at 214–215. After the

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[27] In the instant case the Commission found that the state-prescribed intrastate rates are "abnormally low" (fdg. 5, R. 119).

[28] In the present case the Commission found that the increase in intrastate rates which it prescribed "will substantially increase the [railroad] respondents' revenues therefrom" (fdg. 6, R. 119).

proceeding had been reopened, such findings were made and the order then entered was sustained. 292 U. S. at 9–11.

The first *Florida* case involved a very unusual type of proceeding with respect to unlawful discrimination under Section 13 (4).[29] There had been no antecedent increase in interstate rates by virtue of a Section 15a revenue proceeding. The matter came before the Commission on a complaint filed by the Georgia Public Service Corporation against one railroad, the Atlantic Coast Line, seeking establishment of reasonable rates on logs from points on the railroad's line within Florida to Georgia destinations. In the course of the proceeding the Commission approved a revision in interstate rates proposed by the respondent railroad. It also made a finding, somewhat incidentally, that lower Florida intrastate rates on logs transported by the respondent railroad for corresponding distances would result in unjust discrimination against interstate commerce, and directed an increase in such rates.

Just as there is a "zone of reasonableness" between maximum and minimum interstate rates (*United States* v. *C. M. St. P. & P. R. R.*, 294 U. S. 490, 506) and rates which come within this zone may be unjustly discriminatory (*United*

[29] In *United States* v. *Louisiana*, 290 U. S. 70, 79, this Court referred to some of the exceptional circumstances under which the question of discrimination was presented in *Florida* v. *United States*, 282 U. S. 194.

States v. *Illinois Central R. R.*, 263 U. S. 515, 524), there is a like zone within which intrastate rates may be reasonable and nevertheless unjustly discriminatory. While Section 13 (4) does not empower the Commission to raise rates above a reasonable level (*United States* v. *Louisiana*, 290 U. S. 70, 78), equally the Commission's power to raise intrastate rates is not limited to those which are less than compensatory. If the Commission's power were so limited, the whole burden of a general upward rate adjustment pursuant to the mandates of Section 15a would be cast upon interstate commerce, in complete frustration of the fair apportionment of this burden between interstate and intrastate traffic contemplated by the grant of power in Section 13 (4) to prevent unjust discrimination against interstate commerce. *Wisconsin Railroad Commission* v. *C. B. & Q. R. R.*, 257 U. S. 563, 585–586; *Florida* v. *United States*, 282 U. S. 194, 211; *United States* v. *Louisiana*, 290 U. S. 70, 74–75.

This Court has upheld the power of the Commission under Section 3 (1) of the Act to increase rates which discriminate against a region or territory even though the rates ordered to be increased were compensatory. *New York* v. *United States*, 331 U. S. 284, 344–347. The principal ground for this conclusion was that, if the section did not authorize such action, there would be cases in which the Commission would be "powerless" to deal with discrimination of the kind

outlawed, *Id.*, p. 346. Like considerations are applicable here.

D. *NORTH CAROLINA* V. *UNITED STATES*, 325 U. S. 507, DOES NOT ESTABLISH THAT THE FINDINGS IN THE PRESENT CASE ARE INSUFFICIENT TO SUPPORT THE COMMISSION'S ORDER

Since appellants' attack upon the findings is grounded upon *North Carolina* v. *United States*, 325 U. S. 507, it is important to examine closely the issues there presented and decided. The contested Commission order required four of the railroads operating in North Carolina to raise their intrastate passenger coach fares to 2.2 cents per mile. The first ground upon which this order was held invalid was that the Commission had never made findings supported by evidence that it was "reasonable and lawful" for railroads in southern territory to charge more than 1.65 cents per mile for interstate coach passengers.[30] 325

[30] While we are here concerned with the ground of decision rather than the correctness of the Court's conclusion, we call attention to matters which led the Court to its conclusion. In 1936 the Commission, after a comprehensive investigation, had ruled that passenger coach fares will violate Sections 1 and 15a of the Act to the extent that they *exceed* two cents per mile, but left "to the discretion" of railroads operating in southern territory continuance of coach fare of 1.5 cents a mile. 214 I. C. C. 174, 255, 256. Early in 1942 the Commission granted a 10% increase in all existing passenger fares to enable the railroads to render adequate and efficient transportation service, an increase which resulted in a fare of 1.65 cents per mile for railroads in southern territory and a fare of 2.2 cents per mile for other railroads. In July 1942 the Commission amended its prior order, without hearing or taking evidence, so as to authorize in southern territory a coach passenger fare of 2.2 cents per mile. 325 U. S. at 516–517.

U. S. at 518. Obviously if, as this Court concluded, the 2.2-cent rate had never been validly determined to be reasonable and lawful for interstate commerce in the territory concerned, this rate could not be prescribed for intrastate commerce, since one of the elements for finding unjust discrimination, a lawfully determined higher interstate rate, was lacking.

The Court also held the Commission's order invalid upon the following grounds: Section 13 (4) does not authorize the Commission to raise intrastate rates above a reasonable level. There was evidence before the Commission that the 2.2 cent rate which it prescribed for intrastate passenger coach traffic in North Carolina was, as to the four railroads involved, above a reasonable rate level for this traffic. Some of the evidence mentioned by the Court was that the four railroads in question were "more prosperous than they had ever been in their history;" that they were in the highest excess profits bracket; and that their average revenue increase since 1936 had been approximately 250%. 325 U. S. at 519. The significance of this evidence was emphasized by the fact that as to other railroads not showing such high profits the State Commission had allowed increases in intrastate rates corresponding to those authorized for interstate rates. The Interstate Commerce Commission made no findings with respect to this compelling evidence that the intrastate rate which it prescribed was above

a reasonable level; in the absence of such findings, the finding that an intrastate rate which was less than 2.2 cents per mile unjustly discriminated against interstate commerce could not stand. 325 U. S. at 520.

The Court also pointed out that the Commission had not made certain other findings (325 U. S. at 515–516), and those mentioned as not having been made are substantially the ones set forth by the present appellants as being essential to the validity of the order here in question. Clearly the absence of such findings was of significance to the validity of an order under Section 13 (4) which was subject to all of the infirmities found to exist in the *North Carolina* case. But the Court in that case did not expressly hold, and we believe that it did not intend to intimate, that such findings are essential to the validity of any order under Section 13 (4). It intended no more, we think, than to indicate the kind of findings which, had they been made, might have served to overcome the compelling force of the showing as to the profits of the four railroads under the existing rates.

The fundamental vice which the Court found in the Commission's order in the *North Carolina* case was that the Commission "relied on the mere existence of a disparity" (325 U. S. at 516) between an interstate rate, the reasonableness of and necessity for which had not been determined by the Commission on the basis of evidence and

findings, and an intrastate rate which was already yielding usually high profits to these particular railroads. In the present case the Commission did not rely on "the mere existence of a disparity." On the contrary, it has found explicitly and after the fullest hearings that the new interstate rates are reasonable and necessary to provide adequate revenues. Its conclusion as to the amount necessary was made on the assumption of corresponding increases in intrastate rates (*supra,* p. 7). The Commission further made a detailed examination of interstate and intrastate rates on numerous representative commodities (*supra,* p. 12) and determined that the relationship between interstate and intrastate rates which had existed over a long period of years prior to its order in *Ex parte 166* afforded a fair criterion for the appropriate contribution to be made by intrastate traffic (*infra,* p. 45). It further found that operating conditions within Florida were not more favorable than for Southern territory generally and that costs of operation on Florida intrastate traffic, if anything, exceeded comparable costs on interstate traffic (*supra,* pp. 13–14, 29). It investigated and made findings as to the rate of profit of the Florida railroads on their entire business, averaging 2.9% on depreciated investment in 1948 (*supra,* p. 14.) On the basis of the foregoing it concluded that intrastate rates lower than those pre-

scribed by it would be "abnormally low," would not contribute their fair share to the carriers' revenue needs, and would therefore discriminate against interstate commerce.

The basis for the order fixing minimum Florida intrastate freight rates is appropriately spelled out in the Commission's report, as follows (R. 112):

> Our power to require an increase in intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate. Respondents are * * * merely [seeking] to secure a contribution to maintenance and operating costs, including taxes, more nearly proportionate to the contribution thereto made prior to the increases in Ex Parte 162 and Ex Parte 166. *We may properly use such prior contribution as a valid criterion of fairness,* in the light of which the Florida intrastate rates and charges in 1947 and 1948 afforded a disproportionately small share of the revenue required to meet the costs of the service in Florida. This condition has been aggravated by the continuing rise in operating expenses following Ex Parte 162 and Ex Parte 166, which impelled us to authorize additional increases in freight rates and charges in Ex Parte 168. [Italics supplied.]

We submit that in the light of the Commission's findings discussed above, and of all the circumstances of this case, the standard used by the Commission was an appropriate one and that nothing in the *North Carolina* case precluded its use.

Whether the findings proposed by appellants are essential raises an issue of far-reaching importance. The over-all plan of the statute is that the railroads should receive sufficient revenue to enable them to operate efficiently. Revenues derived from the transportation service rendered, whether it be interstate or intrastate, provide the means for carrying on both interstate and intrastate transportation. Both alike benefit when the railroads obtain additional revenue needed for adequate and efficient service. It is thus a part of the statutory scheme that intrastate traffic bear its fair share of the whole transportation cost, and Section 13 (4) provides authority for accomplishing this end. That purpose will necessarily be defeated if the findings requisite for valid action under Section 13 (4) are so onerous as to cripple its effective application and enforcement.

II

THE COMMISSION, IN RAISING INTERSTATE FREIGHT RATES AND INTRASTATE FLORIDA RATES UPON THE BASIS OF THE RAILROADS' REVENUE NEEDS AND THE FAIR PROPORTION THEREOF TO BE CONTRIBUTED BY FLORIDA INTRASTATE FREIGHT TRAFFIC, PROPERLY TOOK INTO ACCOUNT THE RAILROADS' DEFICITS IN THEIR PASSENGER OPERATIONS

Section 15a directs the Commission, when prescribing just and reasonable rates, to give due consideration to the railroads' need of revenues sufficient to enable them to provide adequate and efficient "railway transportation service." The "national transportation policy" of the Act directs that all of its provisions be administered to the end of developing a "national transportation system" adequate to the country's needs. Railway transportation service includes both freight and passenger service. The revenue required for furnishing adequate and efficient transportation service is, therefor, necessarily measured by the railroads' total operating costs and capital needs in providing both kinds of service.

When rates are fixed under Section 15a in order to provide for the railroads the revenue required for adequate and efficient transportation service, it would obviously be desirable, if it were feasible, to fix freight rates primarily on the basis of the cost of furnishing freight service and to fix passenger rates primarily on the basis of the costs incident to passenger service. But in

revenue proceedings under that section the Commission has been confronted with the hard fact that in every year since 1929, except for the war years 1942–1945, railroad passenger operations have, as a whole, been conducted at a loss. *Increased Freight Rates, 1948,* 276 I. C. C. 9, 36. Another hard fact confronting the Commission has been that, for the most part, no actual increase in passenger revenues was likely to result from an increase in passenger fares because of the likelihood that an increase would accelerate the enormous inroads upon rail passenger traffic resulting from greater travel by private passenger automobile, motor bus, and air. *Ibid.* Thus, short of authorizing general abandonment of passenger service, the Commission could validly conclude that the only measure available was to attempt to increase revenues from some other source.

In view of these factors, the Commission has for a long period of time taken account of low net operating income or deficits in passenger service when fixing freight rates in Section 15a revenue proceedings.[31] As early as July 1926 the

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[31] Appellants recognize (Br. 18) that the position which the Commission took in 1914 in *Five Percent Case*, 31 I. C. C. 351, that it would not be justified in increasing freight rates to take care of losses incurred in passenger service, represents the position "formerly held" by the Commission. It has consistently ruled, subsequent to the enactment of Section 15a in 1920, that its ruling in the *Five Percent Case* is no longer applicable.

Commission declared (*Revenues in Western District,* 113 I. C. C. 3, 23):

> The freight and the passenger services are both essential and both may be subjected to reasonable rates and charges to produce the fair aggregate return authorized by the law even though thereby a higher rate of return may be exacted from the one than from the other.

In a general freight increase proceeding decided in 1931, the Commission said:

> Foremost among the problems to be solved is that presented by the passenger service. Broadly speaking, this service for the country as a whole fails by something like $450,000,000 annually to contributing its proportionate share toward taxes and return on railroad property. The close similarity of this figure to the amount of money which the carriers estimated that they would realize from the 15 percent increase [in freight rates], if no loss of traffic resulted, is striking. [*Fifteen Percent Case, 1931,* 178 I. C. C. 539, 584.]

It added that in its view *Northern Pacific Ry.* v. *North Dakota,* 236 U. S. 585, and *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605 (discussed *infra,* pp. 51–52), do not prevent "imposition of a burden upon one form of service to compensate for an inevitable deficiency in earnings of another form of service." 178 I. C. C. 539, 565.

In another proceeding of the same kind, decided in 1938, the Commission said that it had repeatedly declined to accede to the proposition that it was without authority to increase freight rates "to correct deficiencies in aggregate earnings growing out of the inability of the passenger business to meet its full share of the revenue burden." *Fifteen Percent Case, 1937–1938*, 226 I. C. C. 41, 54.

In the recent *Ex Parte 168* proceeding, *Increased Freight Rates, 1948*, 276 I. C. C. 9, 35, the Commission said:

> While we regard it as "trite to say that each particular service, coach, sleeper, parlor car, and head end, should as nearly as may be pay its own way and return a profit" * * * yet, if passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, we have felt compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges. *Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations.* [Italics supplied.]

This Court has never even intimated that this long continued policy of the Commission is not a proper exercise of the discretion entrusted to it. On the contrary, in *United States* v. *Louisiana*,

290 U. S. 70, the Court upheld an order of the Commission under Section 13 (4) prescribing increases in Louisiana intrastate freight rates corresponding with the increases in interstate freight rates which had been authorized in *Fifteen Percent Case, 1931, supra,* largely in order to make up for operating deficits in passenger revenues.

The scope of the Commission's discretion in this regard was explicitly recognized by four Justices in *North Carolina* v. *United States,* 325 U. S. 507. That case involved the limited period when passenger traffic was exceptionally profitable because gasoline rationing, movement of men in connection with military service, and other wartime conditions brought a vast increase in passenger traffic. None of the views expressed by the Court in that case appear to be opposed to the following statement in the dissenting opinion (325 U. S. at 534):

> The Commission may conclude that the carriers' required revenue may best be obtained from intrastate passenger fares rather than from freight rates. The reverse was once true. Cf. 214 I. C. C. at 227. These are matters for Commission decision.

Appellants cite *Northern Pacific Ry.* v. *North Dakota,* 236 U. S. 585, and *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605, as compelling the conclusion that the Commission, when fixing freight rates in a Section 15a revenue proceeding,

may not give consideration to railroad passenger deficits. The holding in these cases was that due process constitutional limitations forbid a state from fixing a nonremunerative rate for particular traffic, that in determining this question all costs attributable to the traffic must be considered, and that the nonremunerative rate is not rendered valid by reason of the possibility that the carrier's losses thereunder might be recoverable from its charges for other transportation.

We submit that very different considerations apply to the matter here in issue. Congress has decreed that rates are to be fixed with reference to receipt by the carriers of sufficient revenue to enable them to maintain transportation service adequate to the country's needs. It has left to the Commission the duty of determining the rate adjustments, within the zone of reasonableness, appropriate for giving effect to this mandate. This peculiarly is a matter for administrative judgment. The Commission transcends no constitutional or statutory limitation when, in considering the railroads' over-all revenue needs, it takes account of their total operating costs, and makes an upward rate adjustment as to traffic which will yield more revenue under a higher rate, without adjusting upward rates on traffic where a rate increase would not have this effect.

The nation-wide upward adjustment of interstate freight rates which the Commission approved in *Ex Parte 162* and *166* necessarily provided the frame of reference for the increase which it made in Florida intrastate freight rates, in order that Florida intrastate traffic should contribute its fair proportion of the carriers' needed additional revenue. Passenger deficits were not, as such, a factor in the prescribed intrastate rate increase. They were a factor in this increase only in the sense that they were a factor in the antecedent increases in interstate rates approved pursuant to Section 15a proceedings. But, as already shown, the Commission properly took passenger deficits into account in authorizing the interstate freight rate increases. It follows that its order increasing Florida intrastate freight rates is not invalidated by reason of the consideration which it gave to railroad passenger deficits when it authorized in *Ex Parte 162* and *166* general upward adjustments in interstate freight rates.

The Commission, when it determined in the instant case that Florida intrastate freight rates should be increased, said in its report (R. 113):

> Increased passenger deficits * * * is a condition bearing alike upon intrastate and interstate rates. *There is here no claim or showing that the passenger deficits of the*

> *respondents do not result from intrastate as well as interstate operations,* and the passenger deficit of the East Coast, which operates entirely within Florida, would appear to indicate to the contrary.
>
> The record affords no justification for a difference in treatment in this respect between Florida intrastate traffic, on the one hand, and interstate traffic to and from Florida, on the other hand. The question of passenger deficits is a serious one for both carriers and shippers, and would become even more serious for interstate shippers if this burden were imposed entirely upon them.

Since the Commission, in the general revenue proceedings (*Ex Parte 162* and *Ex Parte 166*), could validly conclude that an increase in freight revenues was the only feasible means of making up for passenger deficits, it follows that it was also proper for it to conclude, in the Section 13 (4) proceeding, that, in order to avoid discrimination against interstate freight shippers, the burden of the increase should be borne alike by intrastate and interstate freight. A similar order, based on like considerations, was sustained by this Court in *United States* v. *Louisiana* (*supra,* pp. 50–51).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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APPENDIX

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, provides in part as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration

of policy. [49 U. S. C. preceding Sec. 1.]

* * * * *

Sec. 13. (3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III. [49 U. S. C. 13 (3).]

Sec. 13. (4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge,

classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. [49 U. S. C. 13 (4).]

* * * * *

Sec. 15a. (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. [49 U. S. C. 15a (2).]

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